SUPREME COURT, U. S.

No. 947

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

ZYLPHA S. BUSTTNER, MARY ELIZABETH BUSTTNER MOORE, PHILLIP BUSTTNER, CHARLES BUSTTNER, ROBERT BUSTTNER and JOHN BUSTTNER, Minors, by and through their mother and next friend, ZYLPHA S. BUSTTNER, *Petitioners*

v.

COMMONWEALTH OF VIRGINIA, *Respondent*

BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PHILLIPS, KENDRICK, GRABEBART & AYLOR

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JURISDICTION

The respondent suggests that this court lacks jurisdiction, there being no substantial Federal question involved, the trial court's order (Petitioner's Appendix A, Page 9) having reserved to the petitioners the right to raise in any other action, the question raised in the subject proceeding.

QUESTION PRESENTED

The respondent adopts the petitioners question.

STATEMENT OF FACTS

The respondent disagrees somewhat with the petitioners' Statement of Facts and therefore make their own statement as follows:

The Virginia State Highway Commissioner, pursuant to authority vested in him by the Legislature of the Commonwealth of Virginia, filed a certificate in the land records of Arlington County where the land is located. He filed under a procedure that is commonly used and is known as the "quick take" or "streamline method" of condemnation. The certificate gave the State Highway Commissioner's estimate of the fair value of the land taken and stated that this amount would be paid by the State Treasurer pursuant to an order of the Circuit Court of Arlington County. Under the laws of Virginia, defeasible title to the property was vested in the Commonwealth of Virginia; simultaneously, the landowners had the right to draw down the estimated value of the land taken and a right to be heard on the just compensation for the land and improvements taken.

Though the petitioners have alleged that the taking was for the purposes of "securing residential homes for selected employees of the Commonwealth of Virginia for their families to have homes in which to live free of charge", there has been no proof of this and it has been denied by the State Highway Commissioner. Furthermore, it contradicts the certificate of taking which stated, "that the land was necessary for the construction, reconstruction, alteration or maintenance of Route 66," an interstate highway.

Before the State Highway Commissioner filed the required Notice and Petition for the appointment of Commissioners and the setting of a date at which time the petitioners might be heard, the petitioners filed a Bill of Complaint to remove the cloud that they alleged existed on their title because of the certificate of taking.

Notice and a copy of the petition for the appointment of commissioners, the proceeding in which the landowners are provided a hearing on valuation, was served on the petitioners in a separate proceeding.

The lower court then dismissed the Bill of Complaint to Quiet Title, a chancery proceeding, on grounds that the petitioners had an adequate remedy at law. They specifically reserved to the petitioners the right to raise any constitutional questions in the proceeding filed by the State Highway Commissioner (notice and petition for appointment of commissioner).

A petition was then taken to the Supreme Court of Appeals of Virginia for a Writ, which was denied.

ARGUMENT

The procedure that the Commonwealth of Virginia uses in its highway condemnation cases is patterned after the Federal Declaration of Taking Act,[1] and has been approved by this court on several occasions.

Under the Virginia system, first the State Highway Commissioner causes a certificate of taking to be recorded in the land records of the county where the land is located which divests title from the owners, and vests title defeasibly in the State simultaneous with the right of the owner to receive just compensation.[2] The cer-

[1] 40 U.S.C., Sec. 258a.

[2] Code of Va. 1950, as amended, Sec. 33-70.4.

tificate of taking affords advance payment to the owner of the estimated value of the property taken.[3] Prior to the filing of any certificate, it is mandatory that a bona fide, but ineffectual, effort be made to acquire, by purchase, that land sought from the owner.[4] The Virginia Legislature has delegated to the State Highway Commissioner the authority to determine what rights of way are necessary and what lands should be purchased or condemned for highway purposes.[5] The decision of the State Highway Commissioner has been held to be in the nature of the legislative determination, and, as such, no hearing is granted to the owner about whether his property will or will not be taken. This absence of opportunity to object to the taking is the real thrust of the petitioner's objection, more will be said about this later. After the certificate of taking has been filed, notice of the petition for the appointment of commissioners who shall view the property, hear evidence and render an award, shall be given to the owner or owners.[6]

This system of highway condemnation is commonly known as the "quick take" method of condemnation and is similar to the system presently used in all but four states. See *Taylor, "Possession Prior to Final Judgment in California Condemnation Procedure"*, 7 Santa Clara Lawyer 37, 41 (1966).

The essential elements of Virginia's system were in fact approved by this court in the case of *Bailey* v.

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[3] Code of Va. 1950, as amended, Sec. 33-70.6.

[4] Code of Va. 1950, as amended, Sec. 33-59.1.

[5] Code of Va. 1950, as amended, Sec. 33-57.

[6] Code of Va. 1950, as amended, Sec. 33-60.1;
Code of Va. 1950, as amended, Sec. 33-60.3.

Anderson, 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945), which dealt with the predecessor to the current condemnation statutes in Title 33, Virginia Code Annotated (1950 as amended). In the case of *Bailey* v. *Anderson,* supra, the State Highway Commissioner had entered into the land and commenced with the construction prior to any view and prior to any hearing on the value of the land taken; there was no hearing afforded to the owner on the necessity of taking his property nor any hearing on compensation prior to actually taking possession of the land. The court said at, 66 S.Ct. 66, 67, 326 U.S. 203, 205, ". . . it has long been settled that due process does not require the condemnation of land to be in advance of its occupation by the condemning authority, provided only that the owners have opportunity, in the course of the condemnation proceedings, to be heard and to offer evidence as to the value of the land to be taken." Citing *Bragg* v. *Weaver,* 251 U.S. 57, 62, 40 S.Ct. 62, 64, 64 L.Ed. 135, and cases cited; *Joslyn Mfg. Co.* v. *City of Providence,* 262 U.S. 668, 677, 43 S.Ct. 684, 688, 67 L.Ed. 1167; *State of Georgia* v. *The City of Chattanooga,* 264 U.S. 472, 483, 444 S.Ct. 369, 371, 68 L.Ed. 796.

As set out in *Section 4.10 of Nichols on Eminent Domain,* p. 460, due process in condemnation proceedings has been held to require: "(a) Notice and an apportunity to be heard; (b) Before a competent tribunal; (and) (c) In an orderly proceeding which is, (1) Adopted to the nature of the case, (and) (2) In accord with established rules which do not violate fundamental rights". However, the notice referred to in part (a) does not mean notice of the taking of the land, for it has been repeatedly held in Virginia and elsewhere that the matter of what property shall and will be taken is

not subject to review as this action is of a "legislative nature". See *Prichard* v. *State Highway Commissioner,* 167 Va. 219, 188 S.E. 166; *The State Highway Commissioner* v. *Yorktown Ice Co.,* 152 Va. 559, 147 S.E. 239 and *State Highway Commissioner* v. *Creager,* 128 Va. 203, 105 S.E. 217. It is this lack of notice that the petitioners claim has not been granted, yet they have not cited one case in which any constitutional section or statute has been set aside because of the failure to provide for this legislative type of hearing or notice.

The petitioners did have notice that their land was going to be taken, as a bona fide offer was made to them in an attempt to purchase the property prior to the filing of the certificate. The specific question of notice was dealt with in the case of *Bragg* v. *Weaver,* 251 U.S. 57, 40 S.Ct. 62, 64 Lawyers Ed. 135 (1919). The court said in that case at 40 S.Ct. 62, 63 and 251 U.S. 57, 58, about the same lack of notice and opportunity to be heard that the petitioners claim that the Virginia statutes fail to provide: ". . . where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment."

Also, in the case of *Rindge Co.* v. *Los Angeles County,* 43 S.Ct. 689, 262 U.S. 700 (1923), the city council had by resolution, determined and found that it would be in the public interest to construct certain highway improvements and, as such, take the land of certain landowners who objected. The landowners argued among other items that there was no public necessity for the taking. Other than the public hearings held incident to the legislative council's action, there was

no opportunity given to the landowner to contest the action of the legislative council. In 43 S.Ct. 684, 693, 262 U.S. 668, 709, the court said: "And so construed this statute is not in conflict with the Fourteenth Amendment, either because it fails to provide for a hearing by the landowners before such resolution as adopted, or otherwise. The necessity for appropriating private property for public use is not a judicial question. This power resides in the Legislature, and may either be exercised by the Legislature or delegated by it to public officers." Also cited by the court in *Rindge Co.* v. *Los Angeles County,* supra, is the decision in the case of *Joslyn Mfg Co.* v. *The City of Providence,* 262, U.S. 668, 43 S.Ct. 684, 67 L.Ed. (1923) which said: ". . . The necessity and expediency of taking property for public use is a legislative and not a judicial question (and) is not opened to discussion. . . . Neither is it any longer open to question in this court that the legislature may confer upon a municipality the authority to determine such necessity for itself. . . . The question is purely political, does not require a hearing, and it is not the subject of judicial inquiry."

The petitioners on page 4 and 5 of their petition, appear to misconstrue and confuse the general condemnation statute with that of the "streamlined method". The petitioners cite Code of Virginia 1950 (as amended) Sec. 25-46.8 (Pet., 4) as requiring a hearing, but that code section is from the general condemnation section and the legislature has provided for different procedures in Title 33 (streamlined provisions) and specifically made the provisions of the general condemnation statute (Title 25) inapplicable.[7] In

[7] Code of Va. 1950 (as amended), Sec. 33-57.3. "The State Highway Commissioner shall not be subject to any limitations in Title 25 of this Code in exercising the power of eminent domain pursuant to this title."

answer to the petitioners allegation that no notice is required, Section 33-60.3 of the Code of Virginia of 1950 (as amended) does exactly what the petitioners request and requires that notice be given to the owner or owners of the intention of the commissioner to appoint commissioners to ascertain what will be a just compensation for the land or interest or estate therein, proposed to be condemned and to award damages, if any, resulting to the adjacent or remaining property of the owner by reason of the taking. This has in fact been done, as indicated in the Statement of Facts by the petitioners. This notice was not given to the petitioners incident to the filing of the certificate, nor was it required to be, but permission is made for the owner to draw down for his own use the estimated value of the property upon his petition.[8] The owner is allowed to file grounds of defense if, however, he chooses not to file an answer, it in no way precludes him from presenting evidence as to the fair market value of any property taken or any damage to the residue. Three cases that the petitioners cite as supporting their case are, *Bragg* v. *Weaver,* supra; *Walker* v. *Hutchinson,* 352 U.S. 112, 77 S.Ct. 200 (1956), and *Bailey* v. *Anderson,* supra. These cases actually uphold as constitutional, the procedure now being used in Virginia.

The one other case that the petitioners cite on the due process question, is *Angle* v. *Commonwealth,* 396 Pa. 514, 153 A.2d 912 (1959), in which the State Highway Commissioner in Pennsylvania filed plans in 1924 showing that a right of way would be ultimately widened to fifty feet; but that widening never occurred. In 1955, Pennsylvania argued that the Statute of Limi-

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[8] Code of Va. 1950 (as amended), Sec. 33-62.1.

tations had run and that a previous taking had already occurred by the mere filing of the plans showing a contemplated widening. The Pennsylvania statutes required that a copy of the right of way plans be filed in the capital of the state as well as in the county where the land is located. The State had failed to file a copy of the plans in the county and the court based its decision on this point saying at 153 A.2d 912, 917, ". . . there is no need to pass upon any possible unconstitutionality (citing the appropriate state statute)."

CONCLUSION

The petitioners cite Section 33-70.4 Code of Virginia 1950 (as amended), as requiring no notice, and charge that this procedure has streamlined away all of the petitioner's rights as guaranteed by the due process clause of the Fourteenth Amendment of the Constitution of the United States. The section, of course, has to be read in conjunction with the other sections of the Code. It does take away from the petitioners the right to legislatively challenge the reasons of the State Highway Commissioner as to the direction that a highway will take, but it retains all of the values inherent in the Constitution for providing due process on determining the just compensation that is due the landowner.

Wherefore, respondent respectfully prays that the Petition for the Writ of Certiorari be denied.

Respectfully submitted,

PHILLIPS, KENDRICK, GEARHEART & AYLOR
By: /s/ WILLIAM B. MOORE
William B. Moore
Attorney for Respondent

CERTIFICATE OF COUNSEL

We hereby certify that on the 14th day of February, 1969, and before filing, four copies of the Brief in Opposition were mailed to opposing counsel, Mark P. Friedlander, Mark P. Friedlander, Jr., Blaine P. Friedlander and Harry P. Friedlander, 2009 North 14th Street, Arlington, Virginia, attorneys for the petitioner.

PHILLIPS, KENDRICK, GEARHEART & AYLOR
By: /s/ WILLIAM B. MOORE
William B. Moore
Attorney for Respondent

APPENDIX A

1950 Code of Virginia

§ 33-57. Power to acquire lands, etc., by purchase, gift or eminent domain; conveyance to municipality after acquisition.—The State Highway Commissioner is hereby vested with the power to aquire by purchase, gift, or power of eminent domain such lands, structures, rights-of-way, franchises, easements and other interest in lands, including lands under water and riparian rights, of any person, association, partnership, corporation, or municipality or political subdivision, deemed to be necessary for the construction, reconstruction, alteration, maintenance and repair of the public highways of the State and for these purposes and all other purposes incidental thereto may condemn property in fee simple and rights-of-way of such width and on such routes and grades and locations as by the Commissioner may be deemed requisite and suitable, including locations for permanent, temporary, continuous, periodical or future use, and rights or easements incidental thereto and lands, quarries, and locations with rights of ingress and egress, containing gravel, clay, sand, stone, rock, timber and any other road materials deemed useful or necessary in carrying out the purposes aforesaid. For the purpose of this article "public highway" means highway, road and street; and when applicable, the term "public highway" also includes bridge, ferry, causeway, landing and wharf.

The Commissioner is authorized to exercise the above power within municipalities on projects which are constructed with State or federal participation, if requested by the municipality concerned. Whenever the Commissioner has acquired property pursuant to a request of the municipality he is authorized to convey the title so acquired to the municipality in accordance with the terms of the agreement between the State and the municipality. The authority for such conveyance shall apply to acquisitions

made by the Commissioner pursuant to previous requests of the municipality as well as any subsequent request.

§ 33-57.3. Limitations in Title 25 not applicable to Commissioner.—The State Highway Commissioner shall not be subject to any limitations in Title 25 of this Code in exercising the power of eminent domain pursuant to this title.

§ 33-59.1. Necessity for attempt to acquire property by purchase.—No proceedings shall be taken to condemn land or other property, nor any interest therein, until a bona fide but ineffectual effort has been made to acquire the same from the owner or owners thereof by purchase, except where consent cannot be obtained because of the incapacity of one or more owners, or one or more of them will not or cannot convey legal title or because such owner, or owners, be unknown or cannot with reasonable diligence be found within this State.

§ 33-60.1. Petition.—The proceedings for such condemnation shall be by petition for the appointment of commissioners to the circuit court of the county, or the court of any city which is vested with jurisdiction of eminent domain proceedings, in which the land, property and rights, or the major portion thereof sought to be acquired is located, or to the judge of such court in vacation. The petition shall set forth with reasonable particularity a description and designation of the interests, rights and property intended to be taken, the name or names of the owners whose property is to be taken or affected, and such other facts, if any, as may be deemed necessary by the Commissioner to give full information to the court and all persons in interest and shall be certified by oath of the Commissioner or by his duly authorized agent or attorney.

§ 33-60.3. Notice to owner or tenant; notice that grounds of defense shall be filed.—Upon or after the filing of the petition as provided for hereinabove, the Commissioner

shall give twenty-one days' notice to the owner or owners or the tenant or tenants of his intention to apply to the court for the appointment of commissioners to ascertain what will be a just compensation for the land or for the interest or estate therein, proposed to be condemned and to award damages, if any, resulting to the adjacent or remaining property of the owner by reason of the taking. The Commissioner may, in his notice provided for herein, also give notice that grounds of defense shall be filed, if the Commissioner be of the opinion that grounds of defense are necessary or desirable.

Such notice shall be served on the owner or owners or the tenant or tenants of the freehold.

§ 33-62.1. Filing of grounds of defense; effect of failure to file.—Within twenty-one days from the service of the notice provided for in § 33-60.3 the owner or owners may file, or if notified so to do by the Commissioner as hereinabove provided, shall file in writing, grounds of defense, such grounds of defense to include valuations of the land and interest to be taken and appraisal of any damages which may result to the residue by reason of the taking.

Should the owner fail to file such grounds of defense as hereinabove provided, such failure shall not preclude the owner from appearing on the date set for the appointment of commissioners nor from presenting evidence as to valuation and damage and to otherwise protect his rights, but such failure shall preclude such owner from any other defense by way of pleas in bar, abatement, or otherwise. Provided, however, for good cause shown, the time for filing such grounds of defense may be extended by the court.

§ 33-67. Payment and vesting of tile.—Upon the return of the report of the commissioners appointed in such proceedings and the confirmation, alteration or modification thereof in the manner provided in this article, the sum so

ascertained by the court as compensation and damages, if any, to the property owners may be paid into court or to the clerk thereof, upon which title to the property and rights condemned shall vest in the Commonwealth of Virginia in fee simple, or to such extent as may be prayed for in the petition, unless such title shall have vested in the Commonwealth pursuant to the provisions of §§ 33-70.1 through 33-70.11 of the Code, and the Commissioner or his agent shall have the right to enter upon the construction upon, or use of, the property and rights condemned as may be authorized by the report.

§ 33-70.4. Recordation of certificates; transfer of title or interest; land situate in two or more counties or cities.— The certificate of the Commissioner shall be recorded in the clerk's office of the court where deeds are recorded. Upon such recordation, the interest or estate of the owner of such property shall terminate and the title to such property or interest or estate of the owner shall be vested in the Commonwealth and such owner shall have such interest or estate in the funds held on deposit by virtue of the certificate as he had in the property taken or damaged, and all liens by deed of trust, judgment or otherwise upon such property or estate or interest shall be transferred to such funds. The title in the Commonwealth shall be defeasible until the reaching of an agreement between the Commissioner and such owner, as provided in § 33-70.11, or the compensation determined by condemnation proceedings as hereinafter provided.

If the land affected by the certificate aforesaid is situate in two or more counties or cities, the clerk of the court wherein the certificate is recorded, shall certify a copy of such certificate to the clerk of the court of the counties or cities in which any portion of the land lies, who shall record the same in his deed book and index it in the name of the person who had the land before and also in the name of the Commonwealth.

§ 33-70.6. Proceedings for distribution of funds; effect of acceptance of payments; evidence as to amount of deposit or certificate.—Any person or persons shown by such certificate to be entitled thereto may petition the court for distribution of all or any part of the funds deposited with the court pursuant to § 33-70.2 or represented by a certificate recorded pursuant to § 33-70.3. A copy of such petition shall be served on the State Highway Commissioner, his deputy or any attorney authorized to accept service with a notice returnable to the court or judge thereof in vacation not less than twenty-one days after such service, to show cause, if any, the said Commissioner can, why such amount should not be distributed in accordance with the prayers of the petition. If the said Commissioner shall not, on or before the return day of the petition, show such cause, and if the record in the proceeding does not disclose any denial or dispute with respect thereto, the court shall enter an order directing the distribution of such amount in accordance with the prayers of the petition; provided, however, that in the case of a nonresident petitioner the court may in its discretion require a bond before ordering the distribution. If funds are not then on deposit with the court but are represented by a certificate pursuant to § 33-70.3, a certified copy of such order shall forthwith be sent to the Commissioner by the clerk. It shall be the duty of the Commissioner to deposit such funds with the court within twenty-one days of the date of such order. Interest at the rate of five per centum shall be payable on such funds for any period in excess of twenty-one days from the date of the order directing the distribution of such funds if the court finds that the Commissioner is responsible for the delay in depositing the funds, and the order of the court directing the distribution shall be amended as shall be necessary to provide for the payment of accrued interest.

If the Commissioner shall show such cause, or if the record in the proceeding disclose any denial or dispute as to the persons entitled to such distribution or to any interest or share therein, the court shall direct such proceedings as are provided by § 33-67.2 for the distribution of awards.

Provided, however, that the acceptance of such payment shall not limit the amount to be allowed by a commission in a condemnation proceeding, nor limit the rights of any party or parties to the proceeding to appeal from any decision therein; nor shall any party to such proceeding be entitled to introduce evidence of any amount deposited with the court or represented by a certificate, nor of any amount which has been accepted by any party entitled thereto pursuant to this section. (1958, c. 581; 1964, c. 487; 1968, c. 232.)